1992

Parker M. Nielson v. Dale Gurley and The Division of Peace Officer Standards and Training, Department of Public Safety, State of Utah : Reply Brief

Utah Court of Appeals

R. Paul Van Dam; Attorney General; Richard D. Wyss; Assistant Attorney General; Attorney for Respondents.
Parker M. Nielson; Petitioner, pro se.

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

PARKER M. NIELSON, Petitioner, vs. DALE GURLEY, and the DIVISION OF PEACE OFFICER STANDARDS AND TRAINING, DEPARTMENT OF PUBLIC SAFETY, STATE OF UTAH, Respondents.	Civil No. 920355-CA Priority No. 14

REPLY BRIEF OF PETITIONER-APPELLANT

ON PETITION FOR WRIT OF REVIEW OF AN ORDER OF THE DIVISION OF PEACE OFFICER STANDARDS AND TRAINING (POST), DEPARTMENT OF PUBLIC SAFETY, STATE OF UTAH

R. PAUL VAN DAM (#3312)
Attorney General
Richard D. Wyss (#3701)
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114
Attorney for Respondents

PARKER M. NIELSON (#2413)
655 South 200 East
Salt Lake City, UT 84111
Petitioner, *pro se*

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REGULATIONS CITED

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Utah Rules of Civil Procedure
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Rule 56 7

AUTHORITIES CITED

Webster's Unabridged Dictionary (2d Ed. 1966) 8, 9

Petitioner, Parker M. Nielson, presents his Reply Brief in Support of Petition for Writ of Review.

REPLY TO STATE'S "ISSUES PRESENTED FOR REVIEW"

The attempt of the State of Utah ("State" herein) to restate Petitioner's Issues Presented for Review at Brief of Respondent p. 2 ("Br. of Resp." herein) is an exercise in futility that misconceives the appeal process. "Plaintiffs are masters of their complaints and remain so at the appellate stage of a litigation." *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040, 3053 (1989), citing *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 398-399 (1987).

SUMMARY OF ARGUMENT

Utah Code Ann. § 63-46b-1(4) permitting a motion to dismiss or for summary judgment "prior to the beginning of an adjudicative proceeding" is dispositive against the State's contention that the APA does not apply until POST issues a Notice of Administrative Proceeding.

I. Utah Code Ann. § 63-46b-1(4) makes it clear that the procedural requirements of the APA apply in all events. It also makes a determination not to proceed prior to commencement of the proceeding a "final order." Utah Code Ann. § 63-46b-3(3)(d) requires that a determination not to proceed be by a "presiding officer" and secures a right to hearing to challenge the denial.

II. The State fails to recognize the difference between "initiation" and "commencement" of the administrative proceeding.

A. If only a "presiding officer" may notify a requesting

party that the request is denied, s/he must also do so after an adjudicative proceeding has been initiated. Utah Administrative Code § R728-409-5-A says only that "[a]ll investigations [shall be] initiated by the division . . . ." (Emphasis added.) Moreover, the State's argument is fundamentally flawed in that (1) Utah Administrative Code § R728-409-5-M necessarily refers only to terminating the investigation and (2) the Citizen Complaint, or request for agency action, derives, not from POST's regulations, but from provisions of Utah Code Ann. § 63-46b-3(3)(a).

B. The terms "initiate" and "commence" are consistently used, in both the statute and regulations, to describe distinctly different steps in the administrative process. An "adjudicative proceeding" is "initiated" by a request for agency action at the first stage of the administrative proceeding explained at Brief of Petitioner. "Commencement of Adjudicative Proceedings" describes the related, but distinctly different process of framing the issues to be adjudicated at the third stage of the administrative proceeding. Restriction of "commencement" of the proceeding to a notice of agency action at Utah Administrative Code § R728-409-8-A neither states nor implies that the adjudication cannot be "initiated" by a citizen Complaint.

III. A "complaint from a citizen which, on its face, appears to be a violation of section 409-3" in Utah Administrative Code § R728-409-5-B(6) contemplates the "request for agency action" provided at Utah Code Ann. § 63-46b-3(3)(a).

A. Utah Administrative Code § R728-409-5-B(6) cannot mean a complaint in the sense of "an expression of

dissatisfaction" rather than a "Complaint" (emphasis added) as "a legal term of art" for the concept "to complain (informally)" is expressed in other provisions of Utah Administrative Code § R728-409. The "complaint from a citizen which, on its face, appears to be a violation of section 409-3" referred to in § R728-409-5-B(6) must refer to the formal "request for agency action" provided by Utah Code Ann. § 63-46b-3(3)(a).

B. Commencement of the adjudicative proceeding by Notice of Agency Action does not preclude initiation of the proceedings by a citizen complaint. Utah Code Ann. § 63-46b-3(3)(a) requires only that there be some provision permitting a person to "initiate" an adjudicative proceeding. The facts of this case demonstrate that POST in fact permitted Petitioner's citizen complaint to "initiate" the proceeding. Whether the proceeding is commenced pursuant to a Notice of Agency Action or a Request for Agency Action, a "presiding officer" must be appointed and the complainant must be accorded a hearing and the right to present evidence, either on the merits or on the propriety of dismissal.

IV. The State's other arguments are easily disposed of.

A. "Perjury" consists of making false statements, under oath. There need not be a formal adjudication of "perjury," although Judge Moffat's formal order would satisfy any such requirement.

B. There is a procedural component to "due process," which the Legislature was concerned with when it enacted Utah Code Ann. § 63-46b-8.

A R G U M E N T

The short, and dispositive, answer to the arguments of the State that only POST can initiate an administrative proceeding and that "[a] citizen complaint cannot require the commencement of an adjudicative proceeding" (Br. of Resp. 7) is provided by the Administrative Procedures Act ("APA" herein). As if anticipating that skillful lawyers would make such facile arguments, and evidently wanting to make it clear that the APA applies in all events, the Legislature provided at Utah Code Ann. § 63-46b-1(4):

> (4) This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from:
>
> * * * *
>
> (b) granting a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56, respectively, of the Utah Rules of Civil Procedure are met . . . . (Emphasis added.)

POINT I

THE RIGHT TO A HEARING AND PROCEDURAL DUE PROCESS ARE SECURED BY THE APA

Thus, even if it could be concluded that an administrative proceeding had not been initiated by Petitioner's citizen Complaint (see analysis of the terms "initiate" and "commence," *infra*.), Utah Code Ann. § 63-46b-1(4) makes it clear that the procedural requirements of the APA nevertheless apply. Procedural due process applies whether Petitioner's Complaint was disposed of by POST under its rules, prior to initiation of an adjudicative proceeding, or after the adjudicative proceeding was commenced.

Utah Code Ann. § 63-46b-1(4) is also dispositive of the State's argument that there was no "final order." APA Section 1(4) makes a determination not to proceed a "final order" whether a formal adjudicative proceeding was commenced or not. Section 1(4) further precludes contentions of the State that the rules relating to dismissal or summary judgment do not apply herein or that Petitioner's allegations in his Complaint are not taken as the facts herein.

Further conclusive against of the State's contentions in that regard, Utah Code Ann. § 63-46b-3(3)(d) provides:

> (d) The presiding officer shall promptly review a request for agency action and shall:
> (i) notify the requesting party in writing that the request is granted and that the adjudicative proceeding is completed;
> (ii) notify the requesting party in writing that the request is denied and, if the proceeding is a formal adjudicative proceeding, that the party may request a hearing before the agency to challenge the denial; or
> (iii) notify the requesting party that further proceedings are required to determine the agency's response to the request.
> (Emphasis added.)

Thus Petitioner was entitled to a hearing, in all events, at least if a hearing was demanded. A hearing was unequivocally demanded on the facts of this case by Petitioner's Motion for Rehearing. It is also clear that the State's contention that staff could dispose of Petitioner's Complaint, without initiating an administrative proceeding, was anticipated and precluded by the legislature, for it provided that only a "presiding officer" can notify a person who files a formal request for agency action that "the request is denied." A "presiding officer" is designated only

when an adjudicative proceeding is initiated. See sub-part 1-*i* of Administrative Code § R728-409-8-B.

POINT II

THE STATE MISREADS POST'S RULES

The State's argument that only POST may "initiate" an administrative proceeding compounds its failure to take account of the foregoing provisions of the APA with failure to properly read and apply all provisions of the Utah Administrative Code, including failure to recognize the difference between "initiation" and "commencement" of the administrative proceeding.

A. POST Regulations Permit Citizen "Initiation" of an Adjudicative Proceeding.

The regulations cannot overrule the foregoing provisions of the APA. Urging that "UAPA is not triggered until an adjudicative proceeding is actually commenced" (Br. of Resp. 10) is categorically rejected by the specific provision of Utah Code Ann. § 63-46b-1(4) to the contrary. There is no need to reach that question, however, for while nothing in either Utah Code Ann. § 63-46b-3(3)(a) or Utah Administrative Code § R728-409-5-B(6) states that the mere filing of a request for agency action constitutes initiation of an adjudicative proceeding, that is the necessary consequence of the language of Utah Code Ann. § 63-46b-3(3)(d). If only a "presiding officer" may notify a requesting party that the request is denied, s/he must also do so after an adjudicative proceeding has been initiated, for Utah Code Ann. § 63-46b-2(1)(h)(i) defines a "presiding officer" to be a

person designated to "conduct an adjudicative proceeding." Thus, there cannot be a "presiding officer" if an adjudicative proceeding has not been initiated.

Utah Administrative Code § R728-409-5-A does not say that all adjudicative proceedings must be "initiated" by POST, nor could it in light of the plain provision of Utah Code Ann. § 63-46b-3(3)(a) that adjudicative proceedings may also be "initiated" by a request for agency action. Section R728-409-5-A says only that "[a]ll investigations [shall be] initiated by the division . . . ." (Emphasis added.)

Moreover, the State's argument is fundamentally flawed in at least two respects:

First, Utah Administrative Code § R728-409-5-E provides that staff can only make "a recommendation to proceed or to discontinue action in the matter." The provision of Utah Administrative Code § R728-409-5-M quoted at Br. of Resp. 9 that "final disposition of a case" will be made "by the bureau chief with the approval of the director" necessarily refers only to disposition of the investigation. Subdivision M creates no authority for staff to make the "decision regarding the final disposition . . . , i.e. whether it should be closed or referred for an adjudicative proceeding," (Br. of Resp. 10, emphasis added) and could not do so in light of the plain provisions of Utah Code Ann. §§ 63-46b-1(4) and 63-46b-3(3)(d). Subdivision M is in a section entitled "investigative procedure," and could not repeal or override the provisions of the APA that a decision to dismiss or enter summary judgment must comply with Rules 12 and 56, Utah Rules of Civil

Procedure, or that a notice that a request for agency action is denied must be by a "presiding officer."

Second, the Citizen Complaint, or request for agency action, derives, not from POST's regulations, but from provisions of Utah Code Ann. § 63-46b-3(3)(a). It is necessary only that the rules of the agency permit the "initiation" by way of a formal citizen complaint, which Utah Administrative Code § R728-409-5-B(6) plainly does. (See discussion of "initiation," as compared with "commencement," *infra*.) The procedure for disposing of the request for agency action is then defined by the APA, not by POST's regulations.

B. The State Confuses "Commencement" with "Initiation."

Careful reading of the APA and the POST regulations reveals that the terms "initiate" and "commence" are consistently used, in both the statute and regulations, to describe distinctly different steps in the administrative process.

The term "initiate" is defined by Webster's Unabridged Dictionary (2d Ed. 1966) as "to do the first act, perform the first rite" and is employed at Utah Code Ann. § 63-46b-3(3)(a) in that sense to describe the relationship between the request for agency action and the adjudicative proceeding. "Initiate" is also used in the sense defined by Webster at Utah Administrative Code § R728-409-5-B(6) to describe the relationship of the Complaint to the investigative procedure. Thus, an "adjudicative proceeding" is "initiated" by a request for agency action under the APA and an "investigation" is "initiated" by a complaint under the

regulations. The term "initiate" therefore describes the first stage of the administrative proceeding explained at Brief of Petitioner pp. 12 and 16.

"Commencement of Adjudicative Proceedings" describes the related, but distinctly different process of framing the issues to be adjudicated, including requiring the accused to respond to the allegations and appointment of the presiding officer. "Commence" is defined by Webster as "to begin; to enter upon; to perform the first act of; as, to *commence* operations," (Id.) The term is used in that sense at Utah Code Ann. § 63-46b-3(1), which states that the proceedings may be "commenced" by either a notice of agency action or a request for agency action, and at Utah Administrative Code § R728-409-8-A which declares that all POST adjudicative proceedings shall be "commenced" by a notice of agency action. The term "commence" therefore describes the third stage of the administrative proceeding explained at Brief of Petitioner pp. 12-13 and 19-23.

It must be observed that the "initiation" authorized at Utah Administrative Code § R728-409-5-B triggers the "investigation," or second level of proceedings described at Brief of Petitioner pp. 17-18. Consistent use of the term "commence," as distinguished from "initiate," is carried through in that provision. The "commencement" authorized at either Utah Code Ann. § 63-46b-3(1) or Utah Administrative Code § R728-409-8, by contrast, follows the investigation and requires a "written response" under § R728-409-9. There is therefore nothing inconsistent with an adjudicative proceeding, and an "investigation," being

"initiated" by a "complaint from a citizen," and the same adjudicative proceeding later "commencing" with a notice of agency action. It would be strange, indeed, if there were no provision for such an investigation prior to the adjudication.

The restriction of "commencement" of the proceeding to a notice of agency action at Utah Administrative Code § R728-409-8-A, we submit, reflects the natural desire of POST to control the allegations that will be adjudicated. In a case involving allegations of multiple violations of law, such as this one, POST may conclude that some, but not all, claims meet the "reasonable cause" standard specified at Utah Administrative Code § R728-409-5-A, determination of which is the only purpose of the investigation. (See p. 15, *infra*.) Stating that it will be "commenced" by a notice of agency action neither states nor implies that the adjudication cannot be "initiated" by a citizen Complaint. Thus, inclusion of the provision for filing a formal citizen complaint in Utah Administrative Code § R728-409-5-B(6) is logical and consistent with the language of the APA and the needs and desires of POST and does not mean, nor can it in light of Utah Code Ann. § 63-46b-3(3)(a), that Staff can also determine not to proceed with the complaint. Utah Code Ann. §§ 63-46b-1(4) and 63-46b-3(3)(d) preclude that. Only a "presiding officer" can do so.

POINT III

THE STATE CONFUSES FILING OF A COMPLAINT WITH THE ACT OF COMPLAINING

The State's argument is reduced to the question of whether a

"complaint from a citizen which, on its face, appears to be a violation of section 409-3" in Utah Administrative Code § R728-409-5-B(6) means "to complain" informally, or whether it also contemplates the "request for agency action" provided at Utah Code Ann. § 63-46b-3(3)(a).

A. POST Regulations Permit a Formal Citizen "Complaint."

Argument that the term "complaint" at Utah Administrative Code § R728-409-5-B(6) refers to "an expression of dissatisfaction" rather then a "Complaint" as "a legal term of art" (Br. of Resp. 5) is another facile argument. Urging further that "[t]his Court is being asked to find that any time a citizen files a complaint concerning an officer's actions POST must hold a hearing in order to protect the due process rights of the citizen making the complaint" (Br. of Resp. 6) is an appeal to the emotions of this Court with a false cry of alarm, for it ignores the language of the statute, the regulations under it, and the plain statement of Brief of Petitioner to the contrary. We were in fact explicit at Brief of Petitioner p. 17 that "[t]here is no requirement of a hearing by a presiding officer on every informal complaint received by POST, whether verbal or in writing, but when a citizen initiates a formal complaint, by conforming to the requirements of Utah Code Ann. § 63-46b-3(3)(a), staff has no discretion not to proceed." (Emphasis in original.) The State ignores our point following that statement that "[a]gency rules afford the right to complain, but the statute defines the elements of a formal complaint and the procedure to be followed." Id.

Careful examination of the APA and the Utah Administrative Code, such as we have attempted herein and in Brief of Petitioner, reveals the fallacy of the State's bald assertions. Utah Administrative Code § R728-409-5-B(6) cannot mean a complaint in the sense of "an expression of dissatisfaction" rather than a "Complaint" (emphasis added) as "a legal term of art" (Br. of Resp. 5) for the concept "to complain (informally)" is expressed in other provisions of the Utah Administrative Code. Section R728-409-3, for example, provides that "[t]he division may initiate an investigation when it receives an allegation that grounds for refusal, suspension, or revocation exist," which "may come from any responsible source . . . ." Section R728-409-5-C provides that "citizens complaining about peace officers will be requested to sign a written statement detailing the incident [and] swear to the accuracy of the statement . . ." and that POST will then investigate.

Those, we submit, are the informal ways in which citizens are permitted "to complain." In those situations it is obvious that the Director and Bureau Chief can terminate the proceeding under Utah Administrative Code § R728-409-5-E, and need not refer it to a "presiding officer," for they are responsible for its initiation. There is no need for a decision by a "presiding officer," for the person complaining informally has not complied with Utah Code Ann. § 63-46b-3(3)(a) by alleging the six elements there specified.

The "complaint from a citizen which, on its face, appears to be a violation of section 409-3" referred to in § R728-409-5-B(6) is a distinctly different concept, however, and must refer to the

formal "request for agency action" provided by Utah Code Ann. § 63-46b-3(3)(a):

> Where the law applicable to the agency permits persons other than the agency to initiate adjudicative proceedings, that person's request for agency action shall be in writing and signed by the person invoking the jurisdiction of the agency, or by his representative, and shall include (followed by the six elements which must be alleged, all of which were alleged by Petitioner, under oath, at R. 0034). (Emphasis added.)

B. A Notice of Agency Action is Not Inconsistent With, Nor Does it Preclude a Citizen Complaint.

The State is correct at Br. of Resp. 8 that Utah Administrative Code § R728-409-8-A provides that all adjudicative proceedings "shall be commenced by notice of an Administrative Complaint accompanied by a Notice of Agency Action." (Emphasis added.) It is incorrect, however, as the foregoing analysis demonstrates, that commencement of the adjudicative proceeding by Notice of Agency Action precludes initiation of the proceedings by a citizen complaint. Utah Administrative Code § R728-409-5-B(6) plainly permits such a Complaint. Utah Code Ann. § 63-46b-3(3)(a) requires only that there be some provision permitting a person to "initiate" an adjudicative proceeding. The APA prescribes the form of the request in that event.

We have no problem with the notion that proceedings must be "commenced" pursuant to a Notice of Agency Action following "initiation" by a formal citizen Complaint. (Br. of Resp. 7.) The more important point is that a "presiding officer" must be appointed to dispose of either the formal citizen complaint

pursuant to Utah Administrative Code § R728-409-5-B(6) or the Notice of Agency Action under Utah Administrative Code § R728-409-8-A. Utah Code Ann. §§ 63-46b-1(4) and 63-46b-3(3)(a) are explicit in that regard.

The facts of this case demonstrate that POST in fact permitted Petitioner's citizen complaint to "initiate" the proceeding. The State must take the case as it was given to us by POST, just as Petitioner and this Court must do, and may not rewrite the script to fit its arguments on appeal. *Cf. Bell* v. *Hood*, 327 U.S. 678, 681 (1946). POST never took the position in the proceedings below that its rules do not permit initiation of the proceedings by a citizen complaint. POST did not reject Petitioner's Complaint prior to the beginning of a formal adjudicative proceeding, but allowed the proceedings to be initiated, as demonstrated by its investigation. It is clear that POST did investigate, and necessarily concluded, therefore, that the Petition stated probable cause for action on its face, which is the only determination com- mitted to staff under Utah Administrative Code § R728-409-5-A:

> A. All invistigations initiated by the division . . . shall be commenced upon the reasonable belief that cause exists . . . .

Having made that determination, and having "commenced" an investigation, it was not possible for POST to terminate a formal complaint without appointing a "presiding officer" and complying with Utah Code Ann. §§ 63-46b-1(4) and 63-46b-3(3)(d) concerning summary disposition.

It makes little difference, if any at all, whether the

proceeding is commenced pursuant to a Notice of Agency Action or a Request for Agency Action at that point. In either event, a "presiding officer" must be appointed and Petitioner must be accorded a hearing and the right to present evidence, either on the merits or on the propriety of dismissal. The Request for Agency Action had already been filed and served on Gurley and the Division of Wildlife Resources, as Utah Code Ann. § 63-46b-3(3)(a) requires. POST could either "commence" the proceeding on the request for agency action, or issue its own notice of agency proceedings if it favored a different style of pleading.

Thus the Answer of the State, as we predicted it would be at Brief of Petitioner p. 15, is that "peace officer misconduct [may] be dealt with administratively with unfettered and sometimes arbitrary discretion." The obvious flaw in that argument is that it asks this Court to hold the Administrative Procedures Act for naught. If there could be doubt about whether the regulations are inconsistent with the APA, which the foregoing discussion demonstrates there is not, it is removed by Utah Code Ann. § 67-15-2.1:

> The Division of Peace Officer Standards and Training shall comply with the procedures and requirements of Chapter 46b, Title 63, in its adjudicative proceedings.

POINT IV

OTHER ARGUMENTS OF THE STATE ARE IRRELEVANT AND NOT SUPPORTED BY THE RECORD

The State's other arguments are untenable and easily disposed of.

A. False Statements under Oath are "Perjury."

Argument that Gurley did not commit perjury is disingenuous, at least. We invite this Court to examine the phony "citation," a copy of which appears at the margin,*/ and the false affidavit concerning it at R. 0040.

"Perjury" consists of making false statements, under oath. There need be no formal adjudication of "perjury," although Judge Moffat's formal order would satisfy any such requirement. Indeed, Gurley is guilty of more than perjury, for the document reproduced at the margin, which was filed with Judges Young and Moffat, was over the following statement signed by Gurley:

> I certify that a copy of this citation or information was duly served upon the defendant according to law on the above date and I know or believe and so allege that the above named defendant did commit the offence [sic.] herein set forth contrary to law. I further certify that the court to which the defendant has been directed to appear is the proper court pursuant to provisions of (77-7-19).

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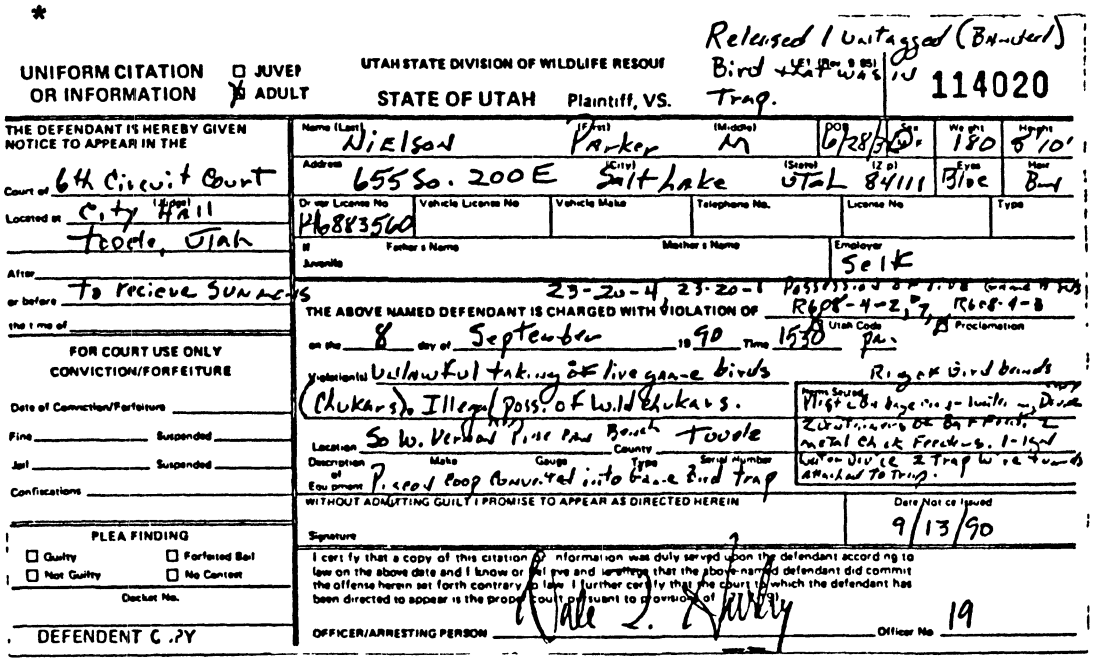
*



UNIFORM CITATION OR INFORMATION ☐ JUVEN ☒ ADULT

UTAH STATE DIVISION OF WILDLIFE RESOUR

STATE OF UTAH Plaintiff, VS.

Released / Untagged (Banded) Bird that was Trap. 114020

THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN THE Court of 6th Circuit Court Located at City Hall Tooele, Utah After or before To recieve SUMMONS the time of

FOR COURT USE ONLY CONVICTION/FORFEITURE Date of Conviction/Forfeiture Fine Suspended Jail Suspended Confiscations

PLEA FINDING ☐ Guilty ☐ Forfeited Bail ☐ Not Guilty ☐ No Contest Docket No.

DEFENDENT COPY

Name (Last) Nielson (First) Parker (Middle) M DOB 6/28/[illegible] Sex M Weight 180 Height 5'10"

Address 655 So. 200 E (City) Salt Lake (State) Utah (Zip) 84111 Eyes Blue Hair Brn

Driver License No. UT6883560 Vehicle License No. Vehicle Make Telephone No. License No. Type

If Juvenile Father's Name Mother's Name Employer Self

23-20-4 23-20-1 Possession of Wild Game Birds R608-4-2,7 R608-4-8

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATION OF Utah Code ☐ Proclamation

on the 8 day of September 1990 Time 1530 p.m.

Violation(s) Unlawful taking of live game birds (Chukars) & Illegal Poss. of wild Chukars. Right Bird bands

Location So. W. Vernon Pine Pass Bench Tooele County

Description of Equipment Piece of Coop Converted into Game Bird Trap Make Gauge Type Serial Number

Items Seized: Flight Cloth bags (2) - Limits, my Drivers License, 2 Shotguns, 1 Box of Shells, 1 Metal Check Knife, 1-Isuzu Citation Issued & Traps were taken Admitted to Trap.

WITHOUT ADMITTING GUILT I PROMISE TO APPEAR AS DIRECTED HEREIN Signature

Date Not to be Issued 9/13/90

I certify that a copy of this citation or information was duly served upon the defendant according to law on the above date and I know or believe and so allege that the above named defendant did commit the offense herein set forth contrary to law. I further certify that the court to which the defendant has been directed to appear is the proper court pursuant to provisions of (77-7-19).

OFFICER/ARRESTING PERSON Dale L. Gurley Officer No 19

The statement is patent falsehood.[**] If Judge Moffatt's formal order is somehow insufficient, Judge Young has now rendered a formal adjudication of Gurley's wrongful conduct, on the merits. A copy of Judge Young's Memorandum Decision is attached hereto as Exhibit "A." Judge Young determined at ¶ 15 that Gurley "intentionally filed a false affidavit with the court" and awarded attorney's fees against him for bad faith conduct under Utah Code Ann. § 78-27-56 at Conclusion of Law ¶ 6. It was further determined at ¶¶ 5, 6, 8, 9 and 10 that Gurley "went beyond his appropriate duties as a Wildlife Resources Officer . . . , disregard[ed] the proclamations of the Wildlife Board . . . [and] acted in a wilful, malicious, and knowingly reckless way . . . ."

The phony citation is a violation of Utah Code Ann. § 76-8-511:

** The phony "citation" is defective in so many particulars that there is no possibility a seasoned peace officer like Gurley, with more than twenty (20) years of experience, could have made such mistakes unintentionally. Consider the following:

1. There is no "6th Circuit Court" in "Tooele, Utah." Tooele is the Third Circuit Court.

2. Direction to appear "to receive summons" does not constitute a "citation." Utah Code Ann. § 77-7-19(2) requires a direction to appear not "sooner than five days or later than 14 days."

3. The address of "655 So, 200 E, Salt Lake UT" is not the address on Petitioner's driver's license. Gurley admitted that he copied the address from the Summons served on him by Petitioner.

4. "Employer-Self" was not information supplied by Petitioner at any time, and certainly not on September 8, 1990. Gurley deduced that information from the Summons showing Petitioner as a solo-practitioner.

5. "Date Notice Issued: 9/13/90" is false, for Gurley has admitted that the "citation" was never issued. The certificate of the Clerk of the Court attached to the Complaint confirmed that no citation was issued.

6. "Defendent [sic.] Copy" (see lower left-half corner) confirms that the document was never mailed. Gurley still had the copy that he certified had been served, under oath, in his possession seven months later and attached it to his affidavit stating, falsely, that he "mailed" it to Petitioner on September 13, 1990.

7. The signature of Dale Gurley, on a document which is part of the official records of the State of Utah, therefore falsely certifies to each of these matters.

There are other falsehoods, which were obvious to Judge Moffat but are not listed above because they require facts not appearing on the face of the document.

> A person is guilty of a class B misdemeanor if he:
>
> (1) Knowingly makes a false entry in or false alteration of anything belonging to, received, or kept by the government for information or record, or required by law to be kept for information of the government; or
>
> (2) Presents or uses anything knowing it to be false and with a purpose that it be taken as a genuine part of information or records referred to in (1) . . . .

Even though not filed with the Circuit Court, the phony citation was filed with the Division of Wildlife Resources and became part of its records.

B. "Due Process" Includes "Procedural" Due Process.

It is curious, we submit, for the Attorney General to argue against due process -- just as curious, perhaps as for POST to advocate for perjury -- but there should be no need to respond to the State's argument that "Petitioner Has No Due Process Rights" because his "life, liberty or property have never been at risk in this case." (Br. of Resp. 11.) The State is obviously correct that both the state and federal due process clauses refer to life, liberty or property. This Court surely needs no citation of authority for the proposition that there is also a procedural component to "due process," however. There can be no doubt that the Legislature meant "due process" in both senses, but primarily was concerned with procedural due process when it enacted Utah Code Ann. § 63-46b-8:

> (a) The presiding officer shall regulate the course of the hearing to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions.

C O N C L U S I O N

Every profession raises the "Wolf! Wolf!" cry that "no one would be willing to become a police officer if faced with having to defend continually against unscreened complaints." (Br. of Resp. 12.) Lawyers and doctors have been notorious for making that argument in the past, but the experience of both professions proves otherwise, and that honest and public airing of professional complaints not only fails to produce the dire predictions, but is the only way to require professional accountability.

This Court has a sterling opportunity, on the facts of this case, to give life and meaning to the Legislature's design to invoke citizen participation and standards of elemental fairness, not just in proceedings before POST, but before all administrative agencies. That can be accomplished by exercising this Court's authority at Utah Code Ann. § 63-46b-17 to "order the agency action required by law," viz., reference of Gurley for prosecution, and "order the agency to exercise its discretion as required by law," viz., to enter the findings proposed by Petitioner on the uncontroverted, and uncontrovertible facts, or directing POST to do so.

Respectfully submitted this ~~21st~~ 22nd day of December, 1992.

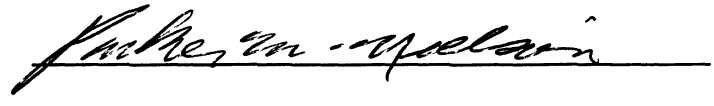
Parker M. Nielson,
Petitioner, *pro se*

(0654)

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing REPLY BRIEF OF PETITIONER-APPELLANT were hand delivered this 2nd day of December, 1992 to:

R. Paul Van Dam, Attorney General
Richard E. Wyss, Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114



(0654)

EXHIBIT "A"

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR TOOELE COUNTY, STATE OF UTAH

* * * * * * * *

PARKER M. NIELSON,	)	**MEMORANDUM DECISION**
Plaintiff,	)	
Vs.	)	
DALE GOURLEY,	)	
Defendant.	)	**Case No. 9003000302 and 9103000249**

* * * * * * * *

The above-entitled matter came on for trial on October 21 and 22, 1992. The jury was waived, the court considered all remaining issues of fact and law presented by counsel at trial. The plaintiff was present and represented both pro se as an attorney and member of the bar and by his attorney, Daniel Darger. The defendant was present and represented by his attorney, Dennis C. Furgeson. The court heard the testimony of the witnesses as presented, received the evidence introduced both documentary and testimonial and further heard the arguments of counsel and based on the foregoing renders its

MEMORANDUM DECISION

1. This action arose through the conduct of the defendant on or about September 8, 1990, wherein the defendant forcefully broke into a locked pen, sometimes referred to by the defendant as a "trap," forcefully disturbed the enclosed nature of the pen,

tipped it on its side, dismantled certain parts and took certain private property that was located there without the consent of the owner.

2. At the time the defendant engaged in such conduct, he knew or should have known that the pen was being used or could have been used in connection with appropriate sport dog which training had been conducted at that location for some years prior. The defendant knew or should have known that the property was that of Parker Nielson, the plaintiff in this action.

3. The court finds that the defendant knew of the activities of dog trainers in that area, both in training their dogs and in conducting field trials, and that the defendant had openly expressed to those dog trainers his hostility and dislike for their activities. Further, the defendant knew or should have been chargeable with the duty to know that his predetermined opinions were improper as a wildlife resources enforcement peace officer and that those individuals engaged in that aspect of sport training were fully authorized to engage in such and the defendant's conduct in complicating their activities was an inappropriate predilection and bias from which the defendant should have refrained. The court finds that it is not illegal to own, posses, or operate a bird pen equipped with recapture cones nor is it illegal for a person to "take" any bird held in private ownership lawfully by means of a recapture cone or pen.

4. The court recognizes that it could occur that wild game could be so captured and the pen owner would be obligated to release such "wild" game or unbanded game when so captured. However, the testimony of the witnesses showed that there was not expected to be any "chucker/partridge" wild game in this area and the defendant's own testimony was that he had not seen any in this area but had seen some at approximately five miles distance.

5. The court finds that the defendant did act with malice, both in his general views of the dog training activity and in particular to Mr. Nielson, whom he knew or should have known, had an appropriate leasehold interest and the right to retake banded birds purchased from a private grower and used in training.

6. The court further finds that the defendant went beyond his appropriate duties as a Wildlife Resources Officer by contacting the United States Forest Service and the Utah Division of Lands and Forestry and their officials in seeking to have those government agencies investigate the activities of the plaintiff and create problems for the plaintiff in conducting his appropriate and lawful activities.

7. The court finds that the defendant specifically attempted to diminish the relationship of the plaintiff and others interested in dog training with the United States Forest Service by taking Forest Service officials to the plaintiff's leased premises and in attempting to persuade those officials that the plaintiff was trespassing on Forest Service land and was conducting unlawful activities thereon.

8. The court finds that the defendant's conduct was beyond the scope of his appropriate duties and he should not have so acted.

9. The court finds the defendant's conduct was wrongful and constituted an effort to disregard the proclamations of the Wildlife Board and formed a sufficient basis upon which the court could and does determine that there is an appropriate factual basis to enjoin the defendant individually from such conduct both in relation to the plaintiff's leasehold land interest and in relation to others similarly engaged in lawful activities *throughout the state.*

10. The court finds that the evidence established at trial shows that the defendant acted in a wilful, malicious, and knowingly reckless way in disregard of the rights of the plaintiff and his leasehold interest in the land in question. The court notes that the uncontroverted evidence is that land useful for dog training of the type and description herein is difficult to find, difficult to value, and difficult to effectively utilize for the purpose of dog training because substantial acreage, upwards of the range of six square miles, is ideally necessary for this kind of activity. This location is one of the very few potential sites available to dog trainers in the state of Utah.

11. The court finds that since the underlying ground leasehold interest remains intact and there is no present indication that it will not be renewed, that no damages should be assessed for the interference with the leasehold activities as a result of the destruction of the pen.

12. The court finds that the supervisors of the defendant in the Division of Wildlife Resources knew or should have known of the defendant's dislike for the activities of the plaintiff and others engaged in similar dog training activities and that they should have appropriately disciplined the defendant prior to the destruction by the defendant of the plaintiff's pen. In addition, the defendant's supervisor should have readily acknowledged the defendant's misconduct and affirmatively tried to limit the defendant and should have sought to remedy the situation with the plaintiff.

13. The court finds that the defendant's claim that the pen was a "trap" under the law is not supported by the evidence and the defendant has failed to meet his burden of proof in so establishing. The court finds that there were several indicators that this was an appropriate recapture pen that were known or should have been known to the defendant. They include but are not limited to the following:

a. The pen was on land known used for upland game dog training by Parker Nielson and others and should have caused the defendant to be aware that recapture pens could be placed thereon.

b. At the site of the pen, their were bands used for banding properly purchased birds and though it may be argued by the defendant that those bands could be placed on wild game so captured, the defendant should have recalled that no wild "chucker/partridge" had been sighted in that area by him and that before destroying the property, he at least could have taken

the band numbers and inquired whether those bands had been appropriately sold to a licensed "chucker/partridge" bird owner.

c. The recapture cones are designed to recapture, without injury, training birds and that should have given the defendant an obvious indication that the pen could be their for a lawful purpose.

14. The defendant had multiple indicators that the pen was there for a lawful purpose and could have at least, without offensively, knocking it down, releasing the birds contained therein and destroying the pen, made appropriate inquiries as to who the owner might be, as to whose land it might be positioned on, and whether the pen could have been placed there for a lawful purpose

15. The court further finds that the defendant has in the conduct of the defense intentionally filed a false affidavit with the court and has intentionally taken a defensive posture that was inappropriate under the circumstances in that the defendant or the Division of Wildlife Resources should have readily offered to remove the defendant from further enforcement activities on this property knowing full well that the defendant maintained continuing hostility toward the plaintiff and his activities.

Based upon the foregoing, the court makes its

CONCLUSIONS OF LAW

1. That the Summary Judgment previously entered on June 4, 1991, is affirmed herein.

2. That the ownership, possession, and operation of the bird pens for domestic birds properly equipped with recapture cones or devices is a lawful and proper use under the laws of the state of Utah.

3. Peace officers, including conservation officers such as the defendant are prohibited from breaking into an enclosure such as that owned by the plaintiff.

4. The defendant in this case may not be heard to claim that the plaintiff's pen was there for the intended capture of "wild" birds as it was being used appropriately and within legal rights.

5. The court finds that the damages to the pen and the replacement costs assessed in damages to the defendant are $2,300.00.

6. The court finds that the plaintiff is entitled to attorney's fees under § 78-27-56 of $ 15,000.00.

7. The court finds that it is appropriate to issue a permanent injunction against this individual defendant from further activities on the plaintiff's leasehold land in relation to Wildlife Management activities. This is not inconsistent with the defendant's duties under the circumstances since the defendant has been transferred to Cedar City, and

should thus have no objection to avoiding any future confrontation associated with the plaintiff and the land in question.

8. The court declines to grant further punitive damages. The plaintiff is awarded damages and fees as stated herein and costs incurred herein.

DATED this 18 day of DECEMBER, 1992.

DAVID S. YOUNG
District Court Judge

Memorandum Decision

18 December 92

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